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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY,

Plaintiffs,

vs.

CLINTON P. ANDERSON, AS SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Defendant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, plaintiffs, concurrently with their petition for appeal presented this day, February 26, 1948, submit herewith their statement particularly disclosing the basis upon which it is contended that the Supreme Court has jurisdiction on a direct appeal to review the order of the District Court, sitting as a statutory three-judge court, entered on January 27, 1948.

Said three-judge court was duly convened pursuant to Section 3 of the Act of August 24, 1937 (50 Stat. 751, chap. 754, 28 U. S. C. A. Sec. 380a), to hear and determine plaintiffs' complaint and motion in Civil Action No. 90-48 for an interlocutory and permanent injunction to suspend and

restrain the enforcement of a part of an Act of Congress upon the ground that it was repugnant to the Constitution of the United States. The statutory court heard the matter as upon a final hearing on the merits (together with Civil Action No. 91-48, which had been consolidated therewith upon motion of defendant), and entered an order on January 27, 1948, holding that the challenged part of the Act was constitutional. This disposed of all issues in Civil Action No. 90-48, and was necessarily a denial of the injunctive relief therein applied for.

I. Statute Sustaining Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the order entered in this cause is conferred by Section 3 of the Act of August 24, 1937 (50 Stat. 751, chap. 754, 28 U. S. C. A. Sec. 380a); and particularly the following provisions thereof:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate immediately two other judges from such circuit for such purpose,

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and it shall be the duty of the judges so designated to participate in such hearing and determination.

• • • • • • •

"An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character."

II. The Act of Congress and Administrative Order Thereunder Which Are Involved

That part of an Act of Congress, the enforcement, operation and execution of which is sought to be enjoined, is Section 4(b) of Public Law 395, 80th Congress, 1st Session (S. J. Res. 167), approved December 30, 1947. The full text of the Act is set forth in Appendix A; the provisions most pertinent hereto are as follows:

"JOINT RESOLUTION

"To aid in the stabilization of commodity prices, to aid in further stabilizing the economy of the United States, and for other purposes.

• • • • • • •

"Section 1. The purposes of this joint resolution are to aid in stabilizing the economy of the United States, to aid in curbing inflationary tendencies, to promote the orderly and equitable distribution of goods and

facilities, and to aid in preventing maldistribution of goods and facilities which basically affect the cost of living or industrial production."

* * * * * * *

"Section 4.

* * * * * * *

(b) Notwithstanding any other provision of law, title III of the Second War Powers Act, 1942, is hereby revived and reenacted for the exercise of the powers, authority, and discretion conferred on the President by such title III with respect to the use of grain for the production of distilled spirits or neutral spirits for beverage purposes. The authority granted by this subsection shall expire on January 31, 1948."

The portion of Title III of the Second War Powers Act, as amended (56 Stat. 176, 178, c. 199; 50 U. S. C. A., App., sec. 633), to which Congress resorted for the sweeping power granted the President by Section 4(b) above for the asserted purposes of the Joint Resolution, is found in Section 2(a)(2) and reads:

". . . Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

There is also intertwined herein the validity of certain provisions of the defendant's order entitled "Allocation of Grain to Distillers" (12 F. R. 8879), issued December 30, 1947, and effective 12.01 a. m., December 31, 1947, which purported to establish specific quotas of grain for use by

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all distillers, including plaintiffs, for beverage purposes. As applied to plaintiffs, the pertinent quota is contained in the following portion of paragraph (c) of said order:

> "(c) *Grain quotas.* • • • no distilling plant shall, during the effective period of this order, use grain or grain products in the manufacture of distilled spirits or neutral spirits for beverage purposes in excess of • • •
>
> "(1) 21 percent of the average monthly base period use of such distilling plant, plus 1.4 times the daily mashing capacity of such distilling plant, minus all quantities of grain and grain products used in such distilling plant for such purposes during the period October 25, 1947 to December 30, 1947, both inclusive, • • •"

IV. Nature of the Case and the Rulings Below

1. Proceedings Below

The plaintiffs filed their two separate complaints on January 8, 1948, and a motion in each case for injunction, on January 9, 1948. One case, Civil Action No. 90-48, prayed for a preliminary and permanent injunction against the enforcement of Section 4(b) of Public Law 395 *solely* on the ground that it was unconstitutional, both in itself and as reflected in defendant's order of allocation and the practical operation thereof as applied to the particular facts bearing on constitutionality. The other, Civil Action No. 91-48, did not dispute the validity of the Act, but sought merely to enjoin the enforcement of certain features of defendant's order (i.e., in so far as it might be deemed punitively retroactive and also arbitrary, capricious and unreasonably discriminatory).

Plaintiffs endeavored to observe the distinction between the two cases by seeking a three-judge court under Section 3 of the Act of August 24, 1937 (50 Stat. 751, chap. 754,

28 U. S. C. A. Sec. 380a), only with respect to No. 90-48. Upon presentation of the complaint and motion for injunction on January 12, 1948, to the Honorable Matthew F. McGuire, Associate Justice of the District Court of the United States for the District of Columbia, the court determined that such action seeking an injunction on the ground that part of a Federal statute was unconstitutional, should properly be considered under that Section. He therefore signed an appropriate application addressed to the Chief Justice of the United States Court of Appeals for the District of Columbia. The next day, the Honorable D. Lawrence Groner, Chief Justice of said Court of Appeals, entered an order duly convening the three-judge court and designating the Honorable Henry W. Edgerton, Associate Justice of the Court of Appeals, and the Honorable James W. Morris, Associate Justice of the District Court, to participate with Associate Justice McGuire in hearing and determining the motion and prayers of the complaint for interlocutory and permanent injunction. The hearing in this Action No. 90-48 was set for January 20, 1948, and written notice thereof was given the Attorney General and the defendant more than five days in advance thereof.

In the meantime, on January 14, 1948, plaintiffs' application for a preliminary injunction in the separate Civil Action No. 91-48 came on for hearing before Associate Justice McGuire, sitting as a single judge. At the outset of the hearing, defendant Anderson moved that this action be consolidated with No. 90-48. In support of this motion, counsel for the defendant Anderson, both orally and in their brief, asserted the substantiality of the constitutional issues in No. 90-48, that the attack (in No. 91-48) on the order was intertwined with and inseparable from the constitutional issues, and urged the propriety of both cases being heard and determined by the statutory three-judge court. Associate Justice McGuire agreed and, over plaintiffs' objection,

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granted defendant's motion and proceeded no furthe at that time. Both cases thereupon proceeded to hearing before the statutory three-judge court.[1]

On the hearing before the statutory three-judge court, it was agreed at bar by all parties that the matter was presented as though on a final hearing, and that the hearing would dispose of the matter in all its phases.

On January 27, 1948, the statutory three-judge court entered an order holding Section 4(b) of Public Law 395 constitutional. This disposed of all issues in Civil Action No. 90-48, and was necessarily a denial of the injunctive relief therein applied for. This court further held in this order, by a majority only, that there was no substantial question of constitutionality. The cause was remitted to Honorable Matthew F. McGuire, sitting as a single district judge, for appropriate action. On January 30, 1948, Associate Justice McGuire filed a memorandum opinion holding plaintiffs' attack on defendant's order to be without merit, and, on February 18, 1948, entered a final order and decree in No. 91-48 denying plaintiffs' motion for injunction and dismissing the complaint in that action.

The appeal herein is from the decision and order of the statutory three-judge court that Section 4(b) was constitutional, which operated as and necessarily was a final denial of plaintiffs' application (in No. 90-48) for an injunction to restrain the enforcement thereof on the sole ground of unconstitutionality. Under Section 3 of the Act of August 24, 1937, quoted above, a direct appeal to the Supreme Court of the United States is the proper, and only,[2] means available to plaintiffs to secure a correction of the errors

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[1] Plaintiffs meanwhile continued to keep the records in the two cases distinct, in so far as possible, by filing separate briefs, affidavits and exhibits in the respective cases.

[2] No appeal can lie to the Circuit Court of Appeals. See *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10, at pp. 16, 18 (1930).

they believe were committed herein by the statutory three-judge court. *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930); *Ex parte Northern Pacific R. Co.*, 280 U. S. 142 (1929); *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911).

See also: *Coffman* v. *Breeze Corps., Inc.*, 323 U. S. 316, (1945); *International L. G. W. Union* v. *Donnelly G. Co.*, 304 U. S. 243, 250, 251 (1938); *United Federal Workers of America* v. *Mitchell*, 330 U. S. 75 (1947).

2. The Facts

Plaintiffs, and their affiliates (designated collectively as the "Schenley Companies") have been for many years and are now engaged in the manufacture and sale of distilled spirits for beverage purposes. For that purpose, *all* beverage distillers, including plaintiffs, use a very minor part of the total amount of grain produced in the United States (less than 1% during the crop year (1946-1947).

Although distilling operations for beverage purposes were controlled as a part of the war and post-war emergency from 1942 to November 30, 1946, all actual restraints were lifted as of the latter date. At the same time, as war-created shortages abated, Congress was seeking to put an end to any possible broad exercise of the allocation power under Title III of the Second War Powers Act (56 Stat. 176, 178, chap. 199; 50 U. S. C. A., App. Sec. 633). This it did, in so far as the use of grain or the operation of distilleries were concerned, in the First Decontrol Act of 1947 (61 Stat. 34, Chap. 29; 50 U. S. C. A., App., Sec. 633 note), approved March 31, 1947. This policy was re-affirmed in the Second Decontrol Act of 1947 (61 Stat. 321, chap. 248; 50 U. S. C. A., App., Sec. 633 note), approved July 15, 1947. Congress' "Findings of Fact and Declaration of

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Policy" in Section 2 of the latter Act were, in effect, a determination that neither grain nor the distilling facilities were any longer "in short supply at home or abroad *as a result of the war*"[2a] so as to require continuing control under "emergency powers."

A few months later, after there had been a substantial failure in the domestic corn crop, the Administration saw fit to inaugurate a voluntary grain conservation program. From October 25, 1947, through December 25, 1947, at the request of the President of the United States, Schenley Companies voluntarily halted production and distilled no grain for beverage purposes. Assurance was given that there would be no request to extend the shut-down beyond this 60-day period. From December 26 through December 30, 1947, Schenley Companies resumed their normal business at a time when there was no law or regulation purporting to restrict or control the use of grain for beverage purposes (and none had existed since March 31, 1947). On December 30, 1947, Section 4(b) of the Act in question, purporting to revive and re-enact Title III of the Second War Powers Act for the sole purpose of allocating the use of grain for beverage distilling purposes, was passed, and the defendant's order was issued, both effective only until January 31, 1948.

Section 4(b) was inserted into the pending bill (purporting only to stabilize the economy, control inflation and promote the equitable distribution of goods and facilities) by the Senate Committee on Banking and Currency on December 16, 1947, without any public hearings or legislative findings on the matter. This Section passed the Senate on December 18th, and passed the House, under an unusual rule prohibiting amendments, on December 19, 1947, the last

[2a] Emphasis ours.

day of the session. The Foreign Aid Act of 1947 (Public Law 389, 80th Congress, 1st Session), passed contemporaneously, had specifically negated any current Congressional intention to allocate materials for domestic use by compulsory controls in furtherance of the Government's foreign policy (Section 10), and required that *all* domestic requirements of grain be carefully considered before any exports should be permitted (Section 11(b)(3), (e)).

Section 4(b) singled out for allocation the use of grain for beverage distilling purposes, leaving uncontrolled all other uses, food, feed and industrial (over 99% of the year's production). It did not establish any provision for assuring that the grain purportedly denied to distillers should be made available to other users. Indeed, it did not establish any mandatory control over purchase or acquisition, so that all users, including distilleries, could stockpile all the grain they might choose to acquire. Neither Section 4(b) nor any other part of the Act contains any legal authority to prevent the export of grain for use abroad in distilling.

Defendant's order issued pursuant to Section 4(b) on December 30, 1947, established basic grain quotas on the basis of purported historical usage ("weighted" two-thirds) and capacity ("weighted" one-third). The effect of this order was to curtail sharply plaintiffs' distilling operations below the levels necessary to replenish its stocks of aged and aging whiskeys used in maintaining its established rate of sales. In addition, as a result of the order, plaintiffs were penalized for lawful operations carried on prior to the passage of the Act, and suffered further through certain discriminating features, as alleged in the complaint.

The irreparable damage to plaintiffs owing to idle facilities, competitive disadvantage and the like is fully set forth in the complaint.

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3. The Issues Involved

The constitutional issues involved, briefly and very generally, are:

a. Is Section 4(b) of Public Law 395 unconstitutional and invalid, being not an exercise of any power granted to the Congress and, hence, violative of the Tenth and Twenty-first Amendments?

Plaintiffs contend that neither the face of the Act, its legislative history or cognate legislation show Section 4(b) to be an exercise of the war powers, but on the contrary to be a general welfare regulation prompted by a corn crop failure occuring in 1947.

Plaintiffs further contend that, assuming arguendo, Section 4(b) is an exercise of the war power, it is unconstitutional because "not naturally and reasonably adapted to an effective exercise of" that power. In other words, under the constitutional facts in this case, there was no real or reasonable relationship between any constitutional power in the Congress and the means chosen in Section 4(b) sufficient to justify the drastic authority conferred to control this single narrow segment of industry. If this is so, the Section is violative of the Tenth and Twenty-first Amendments as a regulation of the manufacture of distilled spirits without any adequate saving relationship to a constitutional power.

b. Does Section 4(b) have such a real and substantial relation to any of the ends specifically stated in the Act, as to save it from conflict with the Fifth Amendment?

c. Does the lack of legislative standards in Section 4(b) constitute an improper delegation of legislative authority under Article 1, Section 1 of the Constitution?

d. Is the order as applied to the facts so discriminatory, capricious and/or so punitively retroactive as to

constitute to that extent a deprivation of plaintiffs' property without due process of law under the Fifth Amendment?

4. Opinion Below [3]

As already noted, the statutory three-judge court on January 27, 1948, entered an order holding Section 4(b) constitutional without discussion. At the same time, it held (by majority opinion only but without further discussion) that there was no substantial question of its constitutionality, and remitted the cause to Associate Justice McGuire, sitting as a single District Judge, for appropriate action. The provisions of this opinion and order are set forth in Appendix B attached hereto.

5. Substantial Character of the Constitutional Questions Involved

The constitutional questions presented by this appeal are basic, and of substantial public importance. They appear both from a reading of the face of the statute involved and an analysis of its application in the facts of this particular case.

(a) The Tenth and Twenty-first Amendments

The first substantial question presented is whether or not Section 4(b) is within the grant of power confided to Congress in the Constitution, or, falling outside that grant, is violative of the Tenth and Twenty-first Amendments as an

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[3] On January 30, 1948, Associate Justice McGuire entered a memorandum opinion holding plaintiffs' contentions (in No. 91-48) against defendant's order to be without merit. On February 18, 1948, he entered a final order and decree denying plaintiffs' motion for injunction and dismissing the complaint in No. 91-48. His opinion and decree did not bear upon the injunction sought on constitutional grounds in the instant cause, No. 90-48.

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unlawful regulation of the manufacture of distilled spirits for beverage purposes.

In raising this question, plaintiffs do not and need not challenge the principles set forth by this court in its recent opinion in *Woods* v. *Miller Co.* (No. 486, October term, 1947, decided February 16, 1948). They are not asserting and need not assert that the war power of Congress ends with the cessation of hostilities; nor is it or need it be contended that the war power may not be exercised after the termination of fighting "to remedy the evils which have arisen from its rise and progress."

It is plaintiffs' contention that, unlike the case of *Woods* v. *Miller Co.*, and the cases cited therein, Congress in enacting Section 4(b) of Public Law 395 did not invoke "its war power to cope with a current condition of which the war was a direct and immediate cause" (*cf.* Opinion in *Woods* v. *Miller Co.*, slip opinion, p. 6); further that if it could be considered as having done so, the means chosen were not naturally and reasonably adapted to an effective exercise of its power and, hence, must be treated as an abuse or subterfuge violative of the Tenth and Twenty-first Amendments.

The situation in this case is quite unlike that which confronted the court in *Woods* v. *Miller Co.*, where the opinion is firmly lodged upon a legislative history that the court felt made it clear that Congress "was invoking its war power to cope with a current condition of which the war was a direct and immediate cause." In this case not only the legislative recitals, but also the *legislative history* and cognate legislation clearly demonstrate that whatever outside observers might conjecture, Congress in passing Section 4(b) of Public Law 395 did not consider itself to be exercising its war power or acting "to remedy conditions the crea-

tion of which necessarily followed from the mobilization of men and materials for the successful prosecution of the war."

Nowhere in the Senate and House Committee Reports (See Sen. Rep. No. 780, 80th Cong. 1st Sess., H. Rep. No. 1230, 80th Cong. 1st Sess.) or in the debates[4] is there any responsible assertion of a relationship between Section 4(b) and the war power or devastated war areas abroad.

For one reason, such an assertion would have been to confess grevious error committed a few months earlier on July 15, 1947, when, in the Second Decontrol Act of 1947 (61 Stat. 321, chap. 240; 50 U. S. C. A. App. Sec. 633 note), it determined, in effect, that neither grain nor distilling facilities were any longer "in short supply at home or abroad as a result of the war" so as to require continuing control under "emergency powers". (See Section 2 thereof). Surely, a judgment of Congress announced in repealing legislation "is entitled to the respect granted like legislation enacted pursuant to the police power." (*cf.* Opinion in *Woods* v. *Miller Co.*, p. 6).

Hence, unlike the situation in the case of *Woods* v. *Miller Co.*, it was not the war but a change in the weather and crop conditions in the year 1947 which was the "direct and immediate cause" of the condition which the legislature attacked.

Other cognate legislation, namely, the Foreign Aid Act of 1947 (Public Law 389, 80th Cong. 1st Sess.) was approved by Congress on December 17, 1947, during the debates on

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[4] See Congressional Record for Tuesday, December 16 through Thursday December 18 for record of Senate debate and for Friday December 19 for House debate. There were no public hearings before Congressional Committees on Section 4(b) or controls of grain because the proposal for legislative control came suddenly on December 16 when the provision first appeared in a draft of the Joint Resolution reported out in the Senate Floor by the Senate Banking and Currency Committee for debate.

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the legislation involved here and two days before its passage. It shows clearly that whatever the purpose of Congress in passing Section 4(b) it was not to aid in the supply of war devastated areas abroad. In appropriating the moneys to provide aid, including food, for the peoples of Austria, China, France and Italy, the Congress carefully stipulated protections against the regulation or restriction of domestic requirements in order to make possible the foreign aid. (See Sections 10 and 11(b)(3), and (e) of the Foreign Aid Act).

It will be time enough to decide the extent to which the government's foreign aid program and consequent regulations of the domestic economy are a proper exercise of the war power when Congress actually purports to or does invoke that power as the basis for legislative controls of domestic trade and manufacture.

So it is submitted one must look to the power of Congress to pursue the purposes set forth in Section 1 of Public Law 395 to measure the constitutionality of Section 4(b). The fact that an executive official improvises, after the passage of the Act and its challenge in the courts, the explanation that Congress *really* sought to exercise its war power, is not sufficient to justify a disregard of the face of the acts, or its plain legislative history. *Stonite Products Co.* v. *Lloyd Co.*, 315 U. S. 561 (1942); *U. S.* v. *Fisher*, 109 U. S. 143 (1883); *U. S.* v. *American Trucking Association*, 310 U. S. 534, 543 (1940); *Continental Casualty Company* v. *U. S.*, 314 U. S. 527, 533 (1942); *Matson Navigation Co.* v. *U. S.*, 284 U. S. 352, 356 (1932); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 289-290 (1936).

One can not read the debates and other legislative background of the so-called Anti-inflation Act (Public Law 395) without being impressed by the fact that Congress faced up to its problem as a new one which might be encountered in

our economy for years and years, i.e., the shape and nature of government controls over the national economy to meet varying economic dislocations. How was the Congress to meet the situation that loomed with an economy now reconverted to record levels of civilian production and consumption, never dreamed of before or even during the war, and facing at the same time long years (at least five) of huge export requirements from both the reviving areas of Europe and the expanding economies of South America and Asia?

It is submitted that if the war power can be invoked to deal with this situation in achieving the purposes of Section 1 of Public Law 395, then we are faced with the prospect that "the war power can be used in days of peace to treat all the wounds which war inflicts on our society" and that "it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well." If, upon this statute, with this legislative history, and this background of legislative action and purpose, Congress in enacting Section 4(b) is to be held as exercising its war power, it is difficult to envisage a Federal act in years to come that will not be equally related to some effect of World War II upon our economy.

Hence, the first substantial constitutional question is whether or not, absent an asserted or actual exercise of a granted power and a demonstrable and appropriate relationship to it, Congress may regulate and control the rate of manufactures by the distilling industry to accomplish the statutory objectives set forth in Section 1 of the Joint Resolution in question.[5] Plaintiffs assert that a logical

[5] "Section 1. The purposes of this joint resolution are to aid in stabilizing the economy of the United States, to aid in curbing inflationary tendencies, to promote the orderly and equitable distribution of goods and facilities, and to aid in preventing maldistribution of goods and facilities which basically affect the cost of living or industrial production." (P. L. 395, 30th Cong. 1st Sess.)

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application of the principles of *Schecter* v. *U. S.*, 295 U. S. 495 (1935) and *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), insofar as they are still controlling authority, holds that Congress is without this power. The more recent cases sustaining production controls such as *Mulford* v. *Smith*, 307 U. S. 39 (1939), *U. S.* v. *Rock Royal Cooperative*, 307 U. S. 533 (1939), and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940), were based upon clear legislative determinations sustained on judicial review of a real and substantial relationship between production controls asserted and interstate commerce.

A decision that Section 4(b) is not an appropriate exercise of the power over interstate and foreign commerce would not and need not entail a determination that Congress is without power to deal with inflation or other domestic or foreign economic difficulties. The cases cited above demonstrate that, given a concrete and specific assertion by Congress that its purpose was to promote interstate and foreign commerce or national defense or appropriate legislative findings or history developing an effective relationship between its action and these purposes, broad scale regulation of the economy can be sustained. This brings the discussion to the other phase of this point directed to the Tenth and Twenty-first Amendments.

Assuming arguendo that a constitutional purpose (such as national defense under the war power or interstate commerce) is to be read into Public Law 395, an examination of the law under the economic facts that provide its setting will show that Section 4(b) is unconstitutional because "not naturally and reasonably adapted to the effective exercise of such power." *Linder* v. *U. S.*, 268 U. S. 5, 17 (1925) and cases cited therein; *cf. Ashwander, et al.* v. *Tennessee Valley Authority*, 297 U. S. 288, 326 (1936).

The provisions of Section 4(b) bear no reasonable rela-

tion to an exercise of the war power or to any other constitutional grant of power to Congress. The wisdom of the legislation is not involved but its unconstitutionality is demonstrated by examination of the underlying facts. The facts are alleged in plaintiffs' complaint and detailed in undisputed affidavits. These facts condition the constitutional validity of legislation. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934). See also. *Weaver* v. *Palmer Bros.*, 270 U. S. 402 (1926); 49 Harvard Law Rev. 631, 634. These facts cannot be propounded at length here without going outside the scope of this jurisdictional statement. However, their full presentation in a hearing on this appeal will demonstrate the serious and substantial nature of plaintiffs' contention.

This question is of a particular serious moment to the beverage spirits industry which depends upon grain as an essential raw material. If any claimed or real shortage in national supplies of grain can be made the basis for regulating the manufacture of this industry, without accompanying conservation measures designed to distribute the impact of such shortage over other grain users and thus provide an effective grain conservation program, then a device for circumventing the Tenth and Twenty-first Amendments has been forged, and this industry will operate in the future only at federal sufferance.

If, in purporting to combat inflation, stabilize the economy or even remedy the evils which have arisen from war, a statute may single out for mandatory control the users of less than 1% of a year's grain production, leaving uncontrolled the users and the use of the remaining more than 99% thereof and establishing no control whatsoever over grain purchases by anyone, then Congress may repeatedly act under a pretext to nullify the clear intention of the

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people manifest in the Twenty-first Amendment. The fleeting, indirect and insubstantial relationship between Section 4(b) and the war power or the commerce power or the relief of economic problems envisaged in Section 1 of Public Law 395 is not an adequate constitutional basis for opening up the distilling industry again to those specializing and particularized Federal controls of it that were responsive to the moral views of a part of the population.

This industry holds a peculiarly protected place against being singled out by an exercise of a power, apart from industry generally, which has the effect of edging toward prohibition. A purported grain conservation program which attempts to regulate by compulsory law the use of grain only in distilling for beverage purposes, without controlling other users or uses of grain, including many other types of industrial users, thereby permitting any savings to be cancelled out, may well be deemed a subterfuge to accomplish an object denied the Federal government by the Twenty-first Amendment. In the absence of any legislative control or allocation of all uses of grain, a law regulating grain use by distillers for beverage purposes is a direct invasion of the Tenth Amendment and violation of the Twenty-first Amendment which took from Congress such.

In this connection, it should be noted that any comfort the government might seek in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919), is completely erased by the reliance placed in that case upon the proposition that the sale of intoxicating liquors was necessary to protect the efficiency of the nation's work force and soldiering in the period of demobilization. The Act in this case is based upon no such premise of a relationship between national efficiency in demobilization and the use of spiritous

liquors and, if it did, it would fail because the act in question here does not attempt to or purport to prohibit their sale.

(b) The Fifth Amendment

The case at bar also raises a substantial issue as to whether or not Section 4(b) violates the due process guaranty of the Fifth Amendment to the Constitution. The due process guaranty demands that a law shall not be unreasonable, arbitrary or capricious, *and* that the means selected shall have a real and substantial relation to the object sought to be attained. *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934). Congress has expressly stated, in the law of which Section 4(b) is a part, the object it was thereby seeking to attain, and the legislative history verifies that statement of purpose. The uncontroverted affidavit, filed herein, of Mr. Leon Henderson, a leading authority in this nation on allocations in particular and economics in general, demonstrates by an analysis of pertinent facts and figures that there is no real and substantial relation between Section 4(b) and the expressed aims of Public Law 395. What is shown is a due process violation like those found in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935), and *Treigle* v. *Acme Homestead Asso.*, 297 U. S. 189 (1936).

In purporting to combat inflation, the statutory provision under attack singles out for mandatory control the users of less than 1% of a year's grain production, leaving uncontrolled the users and the use of the remaining more than 99% thereof, and establishing no control whatsoever over grain purchases by anyone or the export of grain for foreign beverage distillation. Due process demands that classification must bear a just and reasonable relation to the object of legislation. Otherwise it is arbitrary and

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capricious, and a violation of due process. *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422 (1936); *Kansas City Southern Ry. Co.* v. *Road Improvement District*, 256 U. S. 658 (1921). Is not a control over a given industry, by a classification which sets it apart from other persons or classes in like circumstances, which control is without effect on the stated purpose therefor, a violation of the due process guaranty extended to the industry members by the Fifth Amendment? The answer to this question is of grave importance to the public generally. What has been tried with the beverage distillers can be tried with other industries.

(c) The Unlawful Delegation of Legislative Power

The constitutional question raised herein as to an improper delegation of legislative power to the President by Section 4(b) is likewise serious and substantial. During the period when the nation was engaged in a shooting war with a fighting enemy, and total mobilization of the nation's entire resources was the order of the day, the "practicalities" of the situation dictated "ex necessitate" that the Executive Branch of the Federal government be granted the most sweeping of powers. That emergency no longer exists. As the President has proclaimed on December 31, 1946, "hostilities" have ceased (12 F. R. 1). Congress has recognized that the practicalities of the situation are now different. As it said in Section 2 of the First Decontrol Act, March 31, 1947 (61 Stat. 34, chap. 29; 50 U. S. C. A., App., Sec. 633 note):

> "The Congress hereby declares that it is vital to a free economy and full production in the United States that all emergency controls and war powers under the Second War Powers Act be removed except in certain limited instances.

> "The Congress further declares that in each such limited instance the authority for such emergency controls and war powers should not be exercised by the grant of broad, general war powers but should be granted by restrictive, specific legislation."

It is a serious constitutional question raised herein, and of great public importance, whether Congress may still delegate its legislative authority, without limiting standards or criteria, when the practicalities of the situation no longer make such necessary. Section 4(b), in its practical effect and as used, permits the Executive to impose or not impose a law as he sees fit; and further, if he does decide to impose the law and allocate the grain, to do so in any manner, on any condition and to any extent he determines. This sort of delegation was declared unconstitutional in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935), and *Schecter* v. *U. S.,* 295 U. S. 495, 538 (1935). Only by ignoring these cases can the issue be treated as insubstantial here.

(d) The Substantiality of these Questions

Whatever the ultimate view of the Court on the merits of the constitutional questions raised herein, these questions are *substantial,* and the opinion below to the contrary (by a majority only) should not be permitted to stand.

This is not the *Jameson* case where the basis of complaint was a certain administrative action, and where complete relief would have been possible without raising any constitutional issue against the underlying statute. *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171 (1939). In the instant case, the constitutional issue raised in No. 90-48 and on this appeal is not frivolous, but is vital if complete relief is to be secured. Plaintiffs' attack on defendant's order in the other action (No. 91-48), even if successful in eliminating

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its discriminatory features, could achieve only partial relief, since the propriety of the sweeping allocation power granted the defendant under the statute would remain unchallenged and an effective control of plaintiffs' grain use would remain.

Nor is this a case where constitutionality of the provision attacked is obvious from the face of the statute or from previous decisions of the Supreme Court. E.g., *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255 (1938). On the contrary, as heretofore shown, Section 4(b) of the Act in question, both upon its face and from its legislative history, raises a substantial doubt of any proper exercise of congressional power.

There is no compelling similarity here to *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919), or *Ruppert* v. *Caffey*, 251 U. S. 264 (1920), which upheld the validity of the War-Time Prohibition Act forbidding the manufacture *and sale* of intoxicating beverages and passed 10 days after the Armistice in World War I. In those cases, the war power was specifically invoked by Congress to conserve manpower and promote efficiency during demobilization which reflected a generally held public judgment reflected in the Eighteenth Amendment to the Constitution, ratified two months after these laws were passed.

No such circumstances can be found herein to justify the passage of Section 4(b) of Public Law 395. The war power was not invoked. Prohibition has been repealed, and there is involved no purpose, actual or purported, to conserve manpower or promote efficiency during demobilization.

There is no continuation of any war-created grain shortage such as helped support the Prohibition Law in the *Hamilton* and *Ruppert* cases. Here, such a shortage has

been declared officially over, and Congress has not even purported to restore the over-all grain controls once deemed necessary. Indeed, when one notes the lack of any control over inventories or purchases of grain (even by distilleries), any possible relation of Section 4(b) to a proper constitutional objective is extremely remote.

The fact that courts have upheld Title III of the Second War Powers Act (purportedly revived and re-enacted by Section 4(b) of the Act in question), is not decisive on the constitutional questions raised herein regarding the Tenth and Fifth Amendments and the unlawful delegation of legislative power. As already noted, plaintiffs are not disputing the broad constitutionality of allocation powers during the period of hostilities. Nor are they contending that Congress could not pass appropriate legislation to deal with continuing deficits caused by the war, as upheld in *Woods* v. *Miller Co., supra,* U. S. Sup. Ct., Feb. 16, 1948; and see *Hamilton* v. *Kentucky Distilleries Co., supra; Ruppert* v. *Caffey, supra.*

Plaintiffs' contention is much narrower, i.e., that Section 4(b), standing alone and under the undisputed circumstances of its passage, is not such legislation. Hence, it must be weighed in the crucible of judicial review. Only by painstaking inquiry into alleged abuses of the war power, when invoked after the conflict, will we protect the liberties of our people and preserve the federal system. *Cf.* concurring opinion of Justice Jackson in *Woods* v. *Miller Co., supra.*

The public importance of these constitutional questions transcends the beverage spirits industry of which plaintiffs are a part to effect and concern the entire range of the United States productive and distributive economy.

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The world has been blanketed by new forms of governmental controls over national economies, e.g., allocation of raw materials, production controls, price controls, wage controls, credit and trade controls, etc. They were derived originally from totalitarian political concepts or autarchic economic principles or forced upon unwilling nations by the exigencies of war. Adopted by the United States as necessary instruments to survival in total war, partially in World War I, and without reservation in World War II, the utilization of these controls as war powers for purposes with a bona fide relationship to war or national defense is not open to serious questions. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398 (1944); *Brown* v. *Wilemon,* 139 F. 2d 730 (C. C. A. 5, 1944), cert. den., 322 U. S. 748; *Bowles* v. *Willingham,* 321 U. S. 503 (1944); *Taylor* v. *Brown,* 137 F. 2d 654 (E. C. A. 1943), cert. den., 320 U. S. 787; *O'Neal* v. *United States,* 140 F. 2d 908 (C. C. A. 6th 1944), cert. den., 322 U. S. 729. But what is still very much undecided and clearly reserved in those decisions is the extent to which and under what circumstances these war-born devices may be revived and re-enacted by the same or another name to deal with an economic or political problem without an established or bona fide relationship to the war powers or even an assertion as such by Congress.

The application and adaptation of the time-honored doctrine of *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326 (1816), and *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819), reaffirmed in the most recent approvals of the exertion of broad national authority (*U. S.* v. *Darby,* 312 U. S. 100, 124 (1941), and other landmarks of constitutional law to the exertion of federal power in the post-war period can not be long deferred. The wholesale elimination of war-time controls, the continued legislative and executive recognition

that the unquestioning acceptance of these controls for war purposes is no longer necessary or appropriate, and the apparent historical imperative that legally executed treaties of peace will be long delayed or without great significance, make necessary and of grave national importance a judicial appraisal of some of the metes and bounds that the constitutional system imposes upon sweeping federal controls of the economy. To fail to make this appraisal now is to give over the federal system embedded in the Constitution as a hostage to a concept of permanent and enduring total war.

The government would avoid that question in this case by finding a legislative purpose and relationship (i.e., to aid the national defense by the reconstruction of war-torn Europe) for this section of the law under challenge, for which there is no basis on the face of the act, the legislative history, or the "constitutional facts" as developed in the hearing below. In effect it asked the court below to wrap the protective cloak of the war powers around the legislative act on the basis of a self-serving affidavit of the defendant executive official. If the requirements of the Constitution can be so by-passed, then the courts will have foreclosed their inquiry into the validity of federal legislation in the post-war period. For surely there is fused into every phase of national life, in a period after a total war, "effects which may be felt in the economy for years and years."

This Court has already determined that it will not indulge an undiscriminating and unquestioning acceptance of every legislative act for which there is some shadowy claim of relationship to war or outgrowth from war. Such a policy would not be necessary to national survival or conducive to a retention of our constitutional system. In examining the "implications" of its decision (*Woods* v.

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Miller Co., supra) approving a continuance of war-time rent controls in the terms of the majority and both concurring opinions, this Court has recognized already the substantiality of the constitutional questions presented in this appeal.

Respectfully submitted,

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APPENDIX "A"

(Public Law 395—80th Congress)

(Chapter 526—1st Session)

(S. J. Res. 167)

JOINT RESOLUTION

To aid in the stabilization of commodity prices, to aid in further stabilizing the economy of the United States, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

DECLARATION OF PURPOSES

Section 1. The purposes of this joint resolution are to aid in stabilizing the economy of the United States, to aid in curbing inflationary tendencies, to promote the orderly and equitable distribution of goods and facilities, and to aid in preventing maldistribution of goods and facilities which basically affect the cost of living or industrial production.

VOLUNTARY AGREEMENTS

Sec. 2. (a) In order to carry out the purposes declared in section 1 of this joint resolution, the President is authorized to consult with representatives of industry, business, and agriculture with a view to encouraging the making, by persons engaged in industry, business, and agriculture, of voluntary agreements approved by the President—

(1) providing for allocation of transportation facilities and equipment;

(2) providing for priority allocation and inventory control of scarce commodities which basically affect the cost of living or industrial production; or

(3) providing for regulation of speculative trading on commodity exchanges.

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(b) The President is authorized to approve any such agreement which he finds will carry out any of the purposes declared in section 1 of this joint resolution, except that he shall not approve any agreement unless such agreement specifically provides that it shall cease to be effective on or before March 1, 1949, and he shall not approve any agreement which provides for the fixing of prices.

(c) Whenever a governmental officer or agency determines that a plan of voluntary action with respect to any material, commodity, of facility is practicable and is appropriate to the successful carrying out of the policies set forth in said Act, that agency or official may request in writing compliance by one or more persons with such plan of voluntary action as may be approved by the Attorney General. Any act or omission by such person or persons in compliance with a written request made pursuant to this section and with a voluntary plan promulgated thereunder shall not be the basis at any time for any prosecution or any civil action or any proceeding under the antitrust laws of the United States or the Federal Trade Commission Act.

(d) Such written request may, in the discretion of the governmental officer or agency which made the request, be withdrawn at any time by said governmental officer or agency, by written notice from said governmental officer or agency of such withdrawal to the Attorney General, and after publication of notice of such withdrawal in the Federal Register as provided in subsection (e), the provisions of this Act shall not apply to any subsequent act or omission by reason of such request or voluntary plan.

(e) The Attorney General shall transmit to the President pro tempore of the Senate and to the Speaker of the House of Representatives, and shall order published in the Federal Register every such request, and any withdrawal thereof, and any plan, program, or other arrangements promulgated under, or which is the basis of, any such request.

(f) The power to make requests conferred by this Act shall expire upon expiration of section 2 of this Act, and

any requests made and voluntary plans adopted under this Act shall have no force or effect six months thereafter.

(g) As used in this section the term "person" means an individual, corporation, partnership, or association.

EXPORT CONTROLS

SEC. 3. (a) Section 6 (d) of the Act of July 2, 1940 (54 Stat. 714), as amended, is amended by striking out "February 29, 1948" and inserting in lieu thereof "February 28, 1949".

(b) Notwithstanding any other provision of law, the President in the exercise of the powers, authority, and discretion conferred upon him by such Act of July 2, 1940, as amended, is authorized to use price criteria in the licensing of exports, either by giving preference among otherwise comparable applications to those which provide for the lowest prices, or, in exceptional circumstances, by fixing reasonable mark ups in export prices over domestic prices.

ALLOCATION OF TRANSPORTATION FACILITIES AND GRAIN

SEC. 4. (a) Notwithstanding any other provision of law, title III of the Second War Powers Act, 1942, as amended, shall continue in effect to and including February 28, 1949, or such earlier date as the Congress by concurrent resolution or the President may designate, for the exercise of the powers, authority, and discretion conferred on the President by such title III with respect to the use of transportation equipment and facilities by rail carriers.

(b) Notwithstanding any other provision of law, title III of the Second War Powers Act, 1942, is hereby revived and reenacted for the exercise of the powers, authority, and discretion conferred on the President by such title III with respect to the use of grain for the production of distilled spirits or neutral spirits for beverage purposes. The authority granted by this subsection shall expire on January 31, 1948.

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Delegation of Authority

Sec. 5. The authority granted to the President by section 2 of this joint resolution and, notwithstanding the provisions of section 6 of the Second Decontrol Act of 1947, the authority granted to the President by section 4 of this joint resolution and by section 6 of the Act of July 2, 1940 (54 Stat. 714), as amended, may, to the extent the President directs, be exercised by any department, agency, or officer in the executive branch of the Government.

Critical Shortages—Recommendations by the President

Sec. 6. (a) Whenever the President shall determine that there is or threatens to be a critical shortage of any raw material, commodity, or product with jeopardizes the health or safety of the people of the United States or its national security or welfare and that there is no prospect that such critical shortage may soon be remedied by an increase in the available supply without additional governmental action and that the situation cannot be solved by voluntary agreement under the provisions of this Act, he may prepare proposed measures for conserving such raw material, commodity, or product which he shall submit to the Congress in the following form:

(1) A statement of the circumstances which, in the President's judgment, require the proposed conservation measures.

(2) A detailed procedure for the administration of the proposed measures including the additional budget and additional personnel required for their enforcement.

(3) The proposed degree of curtailment in current and prospective use of each such raw material, commodity, or product by each processor and/or user thereof, including the specific formulae proposed for such curtailment with respect to each class or classes of processors or users and the criteria used in the establishment of such formulae.

(4) A complete record of the factual evidence upon which his recommendations are based, including all information provided by any agency of the Federal Government which

may have been made available to him in the course of his consideration of the matter.

(b) Within fifteen days after the submission of such proposed conservation measures, the Joint Committee on the Economic Report shall conduct public hearings thereon and shall make such recommendations to the Congress for legislative action as in its judgment the recommendations of the President and any additional information disclosed at the public hearings may require.

Production of Foods in Non-European Foreign Countries

Sec. 7. Notwithstanding any other provision of law, in order to alleviate and prevent shortages in foods, agricultural commodities, and products thereof, Commodity Credit Corporation is authorized to carry out projects to stimulate and increase the production of foods, agricultural commodities, and products thereof, in non-European foreign countries. Such projects may include procurement, the making of advances and price guaranties, the furnishing of technical information and assistance, the furnishing of seed, fertilizer, machinery, equipment and other materials, and such other actions as are necessary or incident to the carrying out of such projects: *Provided,* That any such program is first submitted to Congress by the Secretary of Agriculture and is not disapproved by concurrent resolution of Congress within sixty days thereafter.

Food and Feed Conservation Program

Sec. 8. (a) In order to alleviate shortages in foods and feeds, and to assist in stabilizing prices, the President shall carry out a program for the conservation of food and feed. In carrying out such program, the President is authorized, through the dissemination of information, educational and other campaigns, the furnishing of assistance, and such other voluntary and co-operative measures as he deems necessary or appropriate, to encourage and promote the efficient utilization, care, and preservation of food and feed,

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the elimination of practices which waste food and feed, the control and eradication of insects and rodents, the consumption of less of these foods and feeds which are in short supply and more of those foods and feeds which are in abundant supply, and other conservation practices. The authority herein conferred may be exercised by the President through such departments, agencies, independent establishments, and officials of the Federal Government and such State, local, and private agencies as he may determine.

(b) There is hereby authorized to be appropriated to the President such sums as may be necessary to carry out this section. To enable the President to carry out this section for the remainder of the fiscal year ending June 30, 1948, there is hereby made available not to exceed $1,000,000 from any funds made available by the Congress for carrying out Public Law 84, Eightieth Congress, or from any funds made available by the Congress for interim foreign aid. Funds made available for the purpose of this section may be used for necessary administrative expenses, including personal services in the District of Columbia and elsewhere, purchase or hire of motor vehicles, temporary or intermittent services of experts or consultants or organizations thereof, including stenographic reporting services, by contract, without regard to the civil service and classification laws (the compensation of any such individual not to exceed $50 per day). Funds made available for the purposes of this section may be allotted for any of the purposes of this section to any department, agency, or independent establishment of the Government, or transferred to any other agency requested to assist in carrying out this section. Funds allotted to any department, agency, or independent establishment of the Government shall be available for obligation and expenditure in accordance with the laws governing obligations and expenditures of the department, agency, or independent establishment, or organizational unit thereof concerned, and without regard to sections 3709 and 3648 of the Revised Statutes, as amended (U. S. C., title 41, sec. 5, and title 31, sec. 529).

Authorization for Appropriations

Sec. 9. There is hereby authorized to be appropriated such amounts as may be necessary for purposes of carrying out the provisions of this joint resolution.

Approved December 30, 1947.

APPENDIX "B"

Filed Feb. 26, 1948. Harry M. Hull, Clerk.
Filed Jan. 27, 1948. Harry M. Hull, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-48, No. 91-48

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, *Plaintiffs*,

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States, *Defendant*

Before: Honorable Henry W. Edgerton, Associate Justice of the United States Court of Appeals for the District of Columbia, and Honorable James W. Morris and Matthew F. McGuire, Associate Justices of the District Court of the United States for the District of Columbia.

Order

This cause came on to be heard on the complaint and on plaintiffs' application for an injunction.

On consideration whereof the entire Court is of the opinion that that part of Public Law 395 here under attack is constitutional; and a majority of the Court is of the opinion, and the Court so holds, that there is no substantial question of its constitutionality.

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It is therefore ordered by this Court that this cause be and it is hereby remitted to the Honorable Matthew F. McGuire, Associate Justice of the District Court, sitting as a single judge, for appropriate action.

HENRY W. EDGERTON,
Associate Justice of the United States Court of Appeals for the District of Columbia.

JAS. W. MORRIS,
Associate Justice of the District Court of the United States for the District of Columbia.

MATTHEW F. MCGUIRE,
Associate Justice of the District Court of the United States for the District of Columbia.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. ..219...

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, *Appellants*,

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

APPELLANTS' BRIEF IN REPLY TO MOTIONS OF APPELLEE TO DISMISS OR AFFIRM.

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April 5, 1948.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 719...

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, *Appellants*,

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States, *Appellee*.

Appeal from the District Court of the United States for the District of Columbia.

APPELLANTS' BRIEF IN REPLY TO MOTIONS OF APPELLEE TO DISMISS OR AFFIRM.

This statement is filed by appellants, pursuant to Paragraph 3 of Rule 7 of this Court, in reply to motions filed by the appellee on March 16, 1948, to dismiss or affirm the appeal in this cause.

The appeal was addressed to an order of a three-judge court entered on January 27, 1948, which held Section 4(b) of Public Law 395, 80th Cong., 1st Sess., constitutional, with a majority of the court holding that there was no substantial question of constitutionality., and remitted the cause to a single judge "for appropriate action". The action had

been commenced by appellants in the District Court of the United States for the District of Columbia to enjoin appellee from enforcing this section of the law and an order issued thereunder on the ground that Section 4(b) was unconstitutional. Appeal to this Court was duly applied for, allowed, and filed on February 26, 1948.

I. While this Appeal Was Fully Justified When Taken, the Case Now Seems to be Moot.

Public Law 395 was enacted on December 30, 1947, and Section 4(b), the portion challenged in this action, providing for the allocation of grain for the production of distilled or neutral spirits for beverage purposes, expired on January 31, 1948. The unprecedentedly short duration of the regulatory authority thus conferred (31 days) was due to the "stop-gap" character of this particular provision, it being designed to cover an interim period until a more complete and mature consideration of the problem by the Congress could be afforded.

During the early weeks in February following the entry of the order below (January 27, 1948) and the expiration of the legislative authority (January 31, 1948) the enactment of legislation continuing this authority was imminently threatened.[1] This was true up to and through Febru-

[1] (a) On January 29, 1948, the President of the United States, acting pursuant to Section 6 A of Public Law 395, sent a message to Congress recommending that it provide for the exercise at least until October 31, 1948, of the powers conferred by Section 4(b), the legislation challenged in this action. He said:

> "It is contemplated that if the present power to allocate grain is continued beyond January 31, 1948, substantially the same procedure as that provided for in the present order will be used, with such modifications as may be required should the Congress enlarge the grant of authority to include the control of additional uses as recommended in this proposal."

See H. Doc. No. 512, 80th Cong., 2nd Sess., Message from the President of the United States.

(b) On February 11, 1948, the Joint Committee on the Economic Report, to whom the President's Message was referred, recom-

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ary 26, the date of the expiration of the thirty-day appeal period allowed in this type of case under the Act of August 24, 1937 (c. 754, Sec. 3, 50 Stat. 751, 752, 28 U.S.C. 380a).

In order to save their rights to challenge the legislative authority to enact Section 4(b) which seemed about to be continued in a similar form with identical effect, appellants felt it necessary to file their petition for direct appeal. It was their intention at the time the appeal was taken to prosecute it vigorously in event the legislative enactment challenged in this case was renewed as threatened. Appellants saw no other way to obtain an expeditious ruling from this Court on the constitutionality of the type of legislation challenged. To have waived their right to appeal in this case, awaiting the passage of new legislation and challenging it in the District Court by a new action would have been to run a grave risk that, given a similar decision below, the appeal could not have been perfected, heard and determined by this Court before the expiration of its present term. Hence, appellants adopted the only course by which they could adequately protect their rights and obtain

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mended that Congress enact the necessary legislation, setting forth for both Houses its view of the need for such a measure. See Sen. Rep. No. 888, 80th Cong., 2nd Sess.

(c) On February 20, 1948, the Senate Banking and Currency Committee reported out a joint resolution effectuating this recommendation. See Sen. Rep. No. 900, 80th Cong., 2nd Sess.

(d) On February 26, 1948, the day the petition for appeal in this action was allowed, the Senate passed S. J. Res. 186, which continued the authority conferred in Section 4(b) of Public Law 395 by re-enacting title III of the Second War Powers Act, 1942, as amended "with respect to allocation and inventory control of grain for the production of ethyl alcohol, including but not limited to distilled spirits and neutral spirits." This authority would extend until October 31, 1948. It would constitute a continuance of Section 4(b) by reason of a provision under which the executive authorities could reduce the allotment to any distilling plant by the amount used between January 31, 1948, and the effective date of any new order.

(e) S. J. Res. 186, as it passed the Senate was introduced in the House on Feb. 27, 1948, and referred to the House Banking and Currency Committee. No public notice of any action by that Committee is available.

an expeditious ruling from this Court on the important constitutional principles involved in this case in event such a ruling became necessary.

However, during the month that has elapsed since their petition for appeal was allowed, the legislative threat to extend the authority challenged in this action beyond January 31, 1948, the date of its expiration, has subsided, and the renewal legislation is apparently not being pressed for early enactment in the House, having only passed the Senate. Under these circumstances candor calls for a recognition of the validity of that part of the appellee's position in its motion to dismiss which contends that the case is moot by virtue of the expiration of the statutory provision under attack. Appellants would certainly not so concede if the legislation threatened at the time they filed this appeal had been pressed through to final enactment or was being currently pressed in such a manner as to indicate early passage. However, under the current situation, it would seem that there is no subject matter on which the judgment of this Court could operate; under those circumstances, it seems well settled that the Court will not proceed to adjudication and the case is moot.

II. The Three-Judge Court Order Below is Appealable, and Within this Court's Appellate Jurisdiction.

Under these circumstances, appellants are reluctant to burden this Court with a detailed reply to the other points made in the government's motion to dismiss, i.e., that the order below of January 27, 1948, upholding the constitutionality of Section 4(b) was clearly correct, and that such order is not reviewable by direct appeal to this Court. They are of the opinion that these points are not now necessary to a final disposition of the case in view of the agreed position that the case is moot.

However, in the light of the government's contention that appellants adopted an improper procedure in seeking review by this Court, a brief treatment of their reasons for having invoked its appellate jurisdiction under the Act of

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August 24, 1937, seems in order. Appellants' reasons for believing that Section 4(b) is unconstitutional and that the issue of constitutionality is a substantial one are set forth in the Statement as to Jurisdiction, filed with their Petition for Appeal on February 26, 1948, and will not be repeated here.

The government's contention that the three-judge order of January 27, 1948, is not appealable seems to rest on three grounds, namely:

(1) That this Court cannot review a determination of a three-judge court that there is no substantial question of constitutionality; asserting, in effect, that the only proper procedure was the entry of an order of dismissal by a single judge, with an appeal to the local Court of Appeals.

(2) That the three-judge order does not grant or deny an interlocutory or permanent injunction *in haec verba* so as to permit an appeal under the Act of August 24, 1937.

(3) That, in any event, such a jurisdictional question should be raised by mandamus, rather than appeal.

These contentions ignore the mandatory effect of the Act of April 6, 1942 (c. 210, Sec. 3, 56 Stat. 199, 28 U. S. C. Sec. 792), which reads as follows:

> "In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3...., any one of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and

determine any application for, or vacation of, an interlocutory injunction, *or dismiss the action, or enter a summary or final judgment on all or any part of the action: Provided, however,* That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion." (Emphasis added.)

The legislative history of this provision seems to indicate a clear Congressional intent to preclude the procedure prescribed by the appellee on constitutional issues. Among the prominent sponsors of this legislation were the American Bar Association and the Association of the Bar of the City of New York, the latter having written on December 18, 1941, to the House Committee considering the bill, as follows:

"The bill achieves a desirable result in making clear (a) that the Rules of Civil Procedure apply to the preliminary proceedings in actions which must be determined by three-judge courts, and (b) that procedural preliminaries (such as discovery, bills of particulars, the taking of depositions, etc.) may be supervised by a single judge. In providing that the single judge may not dismiss an action, the bill would overrule decisions holding that a single judge may dismiss an action determinable by a three-judge court when the complaint shows on its face that the court lacks jurisdiction (*Ex parte Poresky,* 290 U. S. 30; 3 Moore, Federal Procedure, p. 3566). In this, too, the bill is desirable since in many instances the determination whether on its face a complaint shows that the court has jurisdiction involves a preliminary determination of the constitutionality of the statute or ruling under attack." (House Report No. 1677, 77th Cong., 2d Sess. p. 5.)

The precise question posed by the proceedings below in relation to this Act seems to be a novel one, but the issue is simple. Can a *three-judge court* under the circumstances here involved preclude appellants from a direct ap-

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peal to this Court by determining that there was no substantial question of constitutionality, and remitting the cause to a single judge "for appropriate action", after it had already determined, upon full hearing, that the challenged Act was constitutional?[2] It would seem that a negative answer to this question is required where, as here, there has been a "hearing and determination" by three judges under the statutory scheme, as clarified by the 1942 Act.

(1) A determination *by a three-judge court* that the constitutional question is not "substantial" will not divest a plaintiff litigant of its right to appeal directly from that ruling to this Court.

If it were decided that the ruling had such an effect, appellants' only remedy would seem to be to appeal the question (i. e., whether the constitutional issue was substantial) to the Circuit Court of Appeals, obtain a reversal, have the three-judge court reconvene, modify its order on this point, and enter a final decree which, only then, could be appealed to this Court. It is submitted that such a procedural merry-go-round is contrary to the objectives of the Act of August 24, 1937,[3] and specifically precluded by the clarifying Act of April 6, 1942. The Supreme Court, therefore, is the appropriate appellate tribunal which can and should review *the three-judge holding below,* including its purported disclaimer of jurisdiction. The cases cited by the government, particularly *Jameson & Co.* v. *Morgenthau,* 307 U. S.

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[2] At no time before or during the hearing was the question of "substantially" raised. Indeed, the government asserted, both orally and in its brief supporting the consolidation of appellants' two actions, that the constitutional issue was a substantial one.

[3] That a prime purpose of this Act was to provide expeditious review of federal constitutional issues by direct appeal to this Court, is clear from its legislative history. See Conference Report, H. Rep. No. 1490, 75th Cong. 1st Sess., p. 6; Comments of Representative Sumners, House Manager, 81 Cong. Rec. 8703, August 11, 1937; *cf. Fleming* v. *Rhodes,* 331 U. S. 100, 104, note 6.

171, are inapposite to this proposition. In that case, this Court necessarily determined whether or not the question raised was a substantial one. Its jurisdiction to determine whether or not its jurisdiction is properly invoked in a particular case can hardly be denied.

(2) Appellants' complaint in Civil Action No. 90-48, appealed herein, did not attempt to burden the three-judge court with separate issues not involving constitutionality.[4] It dealt solely with the constitutionality of Section 4(b) under challenge. Hence, the order of January 27, 1948, by holding the challenged section constitutional, necessarily disposed of that case in all its phases. It necessarily denied the injunction sought. It would thus seem unnecessary that the order appealed from deny the injunction and dismiss the complaint *in haec verba*.

The order entered was tantamount to a "final and reviewable judgment" since it "ended the litigation by fully determining the rights of the parties." See *Department of Banking* v. *Pink*, 317 U. S. 264, 267. Even assuming *arguendo* the propriety of the remittitur to the single judge, there was nothing left for him to do but enter an order, more formal in character, denying the injunction. This was purely a "ministerial act" and could not affect the "final and reviewable" nature of the order of January 27, 1948. See *Department of Banking* v. *Pink*, *supra*.

Under these circumstances, it would seem that even though this Court should feel that a mere determination by a three-judge court that no substantial question was presented was not necessarily appealable directly to it, it would not deny the propriety of such an appeal when, as in this case, after a full hearing, conceded at bar by both parties to be final in character, the three-judge court held that the statute was constitutional, thereby precluding the plaintiffs

[4] I. e., Modification of appellee's allocation order which was sought in the separate Civil Action No. 91-48; this was consolidated with the constitutional case only after motion of the appellee and over appellants' objection.

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from the only injunctive relief sought in Civil Action No. 90-48.

(3) Appellants could perhaps have invoked mandamus to secure the entry of a formal decree by the three-judge court denying the injunction and dismissing the complaint. They submit, however, that this extraordinary remedy is not appropriate where the question is one of form rather than substance, and where the result would be to require this Court to pass twice upon the question. For, if this Court should agree with appellants that the claim of unconstitutionality was substantial, it would be forced to grant the writ of mandamus whether or not, in the last analysis, it considered the statute constitutional. Such duplication would seem unnecessary and contrary to the statutory purpose of direct and expeditious review in such cases. It is well settled that mandamus should not be sought where a remedy by appeal is available. *Cf. Stratton* v. *St. Louis Southwestern Ry.*, 282 U. S. 10, at p. 16; *Roche* v. *Evaporated Milk Association*, 319 U. S. 21. In particular, it would seem presumptuous, and a useless thing, to seek mandamus from this Court to secure an appealable order in form as well as substance, where, as here, the case has become moot.

III. Conclusion.

Appellants feel, therefore, that the order appealed from is an appealable order within the statutory jurisdiction of the three-judge court under the Act of August 24, 1937, and that this Court necessarily has jurisdiction to review it on direct appeal. Such jurisdiction, under the present posture of the case, would seem to require only a determination that the case is moot. Should the Court feel, however, that it was necessary or desirable for it to consider any question other than that on which there is agreement, namely that the case is moot, counsel for appellants will be glad of the opportunity to be heard for such

time as the court will permit. They have been and still are of the opinion that:

(1) Section 4(b) of Public Law 395 was unconstitutional.

(2) The determination of the three-judge court below that the section was constitutional, and of a majority of that court that no substantial constitutional question was presented, is error.

(3) The order of January 27 is a final and reviewable order.

Accordingly, appellants join only in that portion of the motion by appellee that would dismiss the appeal on the ground that the case is moot because of the expiration of the statute challenged and the absence of any imminent threat of its re-enactment.

Respectfully submitted,

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April 5, 1948.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 719

SCHENLEY DISTILLERS CORPORATION, THE GEO. T. STAGG COMPANY, BERNHEIM DISTILLING COMPANY, JOSEPH S. FINCH AND COMPANY, THE OLD QUAKER COMPANY, JAS. E. PEPPER & COMPANY, APPELLANTS

v.

CLINTON P. ANDERSON, as Secretary of Agriculture of the United States

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MOTIONS OF APPELLEE TO DISMISS OR AFFIRM

These motions are filed by the appellee pursuant to paragraph 3 of Rule 12 of this Court, in response to the Statement as to Jurisdiction and other papers filed by the appellant, which urge this Court to review on appeal the judgment entered by the court below.

This action was commenced by appellants in the District Court of the United States for the District of Columbia to enjoin appellee from enforcing Section 4(b) of Public Law 395, 80th Cong., 1st sess., or any order issued thereunder. A specially constituted three-judge court was convened

pursuant to the Act of August 24, 1937 (c. 754, sec. 3, 50 Stat. 751, 752, 28 U.S.C. 380a). On January 27, 1948, the three-judge court ordered that the cause be remitted to a single district court judge for appropriate action on the ground that no substantial constitutional question was presented. Appellants' petition for appeal was allowed by the district court on February 26, 1948.

STATEMENT

Public Law 395 was approved December 30, 1947. Section 4(b) of Public Law 395 provides as follows:

> Notwithstanding any other provision of law, Title III of the Second War Powers Act, 1942, is hereby revived and reenacted for the exercise of the powers, authority, and discretion conferred on the President by such Title III with respect to the use of grain for the production of distilled spirits or neutral spirits for beverage purposes. The authority granted by this subsection shall expire on January 31, 1948.

Title III of the Second War Powers Act, 1942 (50 U.S.C. App. Sec. 633), provides, in pertinent part, as follows:

> Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

The authority granted to the President by Section 4(b) of Public Law 395 was delegated to the Secretary of Agriculture, appellee, by Executive Order 9915, dated December 30, 1947 (12 F. R. 8875). On the same day appellee allocated the gross amount of approximately 2,500,000 bushels

of grain for use in the production of distilled spirits or neutral spirits for beverage purposes during the period December 31, 1947, through January 31, 1948. Appellee's order provided for the allocation of grain among the distillers in accordance with a formula giving consideration to usage from December 1, 1946, to March 31, 1947, as a base period and to plant capacity.

On January 8, 1948, appellants, who are engaged in the production and sale of distilled spirits for beverage purposes, filed two complaints and, on the following day, two motions for preliminary injunctions. One complaint alleged the unconstitutionality of the statute and the order issued under it. The other alleged the invalidity of the order. After a three-judge court had been convened in the statutory case, both cases were ordered consolidated upon appellee's motion because of the related constitutional issue. After a hearing before the three-judge court on the applications for preliminary injunctions, an order was entered in the consolidated action on January 27, 1948, which recited the court's unanimous opinion that Section 4(b) of Public Law 395 was constitutional and the holding of a majority of the court that there was no substantial question of constitutionality. The court therefore remitted the case to a single judge for appropriate action. On January 30, 1948, in an opinion which stated "the complaints are dismissed," the single district court judge upheld the validity of the Secretary of Agriculture's order of allocation. On February 17, 1948, an order was entered by the single district judge denying the application for an injunction and dismissing the complaint in the suit which attacked the validity of the order. No further order has been entered in connection with the application to restrain enforcement of the statute.

DISCUSSION

For reasons discussed hereafter, it is doubtful that the order of the three-judge court remitting the case to a single judge for appropriate action is directly reviewable by appeal to this Court. In any event, however, there is no occasion to review the decision below because the case is moot by virtue of the expiration of the statutory provision under attack. Moreover, the determination of the court below that Section 4(b) was constitutional is clearly correct. For the foregoing reasons, it is submitted that the decision below should be affirmed or the appeal dismissed.

1. The expiration of the authority granted by Section 4(b) on January 31, 1948, removes any possible basis for appellants' suit for an injunction to restrain enforcement of its provisions or orders issued under its terms. A determination of the constitutionality of Section 4(b) could have no effect except as an advisory opinion in the event that similar legislation is enacted by Congress in the future, or that a penalty is sought to be imposed for some past violation. There is no subject matter in issue between the parties upon which a judgment could operate. It does not appear that appellants have not complied with appellee's order or that any actions to impose penalties are threatened or imminent, nor does it appear that the Secretary of Agriculture has any present authority to impose penalties for violations that may have occurred. In these circumstances, it is submitted, the case is moot. "It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate." *Ex parte Baez*, 177 U. S. 378, 390; *Brownlow* v. *Schwartz*, 261 U. S. 216, 217. As was held in *Mills* v. *Green*, 159 U. S. 651, 653:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judg-

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> ment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Any damage appellants may have suffered through compliance with appellee's order is beyond the power of this Court to remedy. The case has thus become moot under the general rule that the Court will not pass upon a question when it is powerless to undo what has been done. *St. Pierre* v. *United States,* 319 U. S. 41; *Chandler* v. *Wise,* 307 U. S. 474, 477-478; *Brownlow* v. *Schwartz,* 261 U. S. 216, 217-218; *Director of Prisons* v. *Court of First Instance of the Province of Cavite,* 239 U. S. 633, explained in *United States* v. *Hamburg-American Co.,* 239 U. S. 466, 476; *Richardson* v. *McChesney,* 218 U. S. 487, 492; *Jones* v. *Montague,* 194 U. S. 147; *Ex parte Baez,* 177 U. S. 378, 389-390; *Mills* v. *Green,* 159 U. S. 651, 653; *Menken* v. *Atlanta,* 131 U. S. 405, *List* v. *Pennsylvania,* 131 U. S. 396; *Cheong Ah Moy* v. *United States,* 113 U. S. 216, 218; *Smith* v. *United States,* 94 U. S. 97; *United States* v. *Phillips,* 6 Pet. 776; *United States* v. *Wittmeyer,* 89 F. 2d 660 (C. C. A. 9).

2. The order of the court below upholding the constitutionality of Section 4(b) of Public Law 395 is clearly correct.

a. Despite the express provision of Section 4(b) that "title III of the Second War Powers Act, 1942, is hereby revived and reenacted" in designated respects, appellants contend that it does not purport to be an exercise of the

war power. Its unconstitutionality is therefore asserted on the ground that it is not an exercise of any power granted to Congress. It is further contended that even if an exercise of the war power, Section 4(b) is unconstitutional because it is not reasonably adapted to an effective exercise of that power. Although the revival and reenactment of a portion of "the Second War Powers Act" would seem to be a sufficiently specific expression of an intention to act under the war power, it is clear that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *The Cloyd W. Miller Company,* No. 486, this Term, decided February 16, 1948. Furthermore, the declaration of the purpose, among others in Section 1 "to aid in stabilizing the economy of the United States" and "to aid in curbing inflationary tendencies," as well as the various other provisions of the statute, demonstrates an unmistakable intention to deal with problems arising directly from the recent hostilities. The food shortages in war-ravaged countries and the impact of these shortages on our domestic economy were discussed at length in the congressional debates relating to Section 4(b). See, *e.g.*, 93 Cong. Rec. 11851, 11855, 11856, 11859 (unbound). The power of Congress in the exercise of the war power to reach problems growing out of the war while a state of war still exists cannot seriously be questioned. *Woods* v. *The Cloyd W. Miller Company, supra; Fleming v. Mohawk Wrecking & Lumber Co.,* 331 U. S. 111; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Ruppert* v. *Caffey,* 251 U. S. 264; *Stewart* v. *Kahn,* 11 Wall. 493.

b. Appellants' further argument that Section 4(b) is unconstitutional because it bears no reasonable relation to the solution of problems created by the war amounts to an assertion that diversion of grain from non-food purposes

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has no relation to meeting the problem of world food shortages. This contention is directly refuted by the recent statement of this Court in *Woods* v. *The Cloyd W. Miller Company, supra,* that "prohibition laws which were enacted after the Armistice in World War I were sustained as exercises of the war power because they conserved manpower and increased efficiency of production in the critical days during the period of demobilization, and *helped to husband the supply of grains and cereals depleted by the war effort.*" (Emphasis supplied). Appellants' objection is in effect an attack upon the wisdom of Congress' decision to accomplish its purpose by imposing mandatory controls on a single industry. But this Court has recently announced that it would not strike down legislation "even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area." *United States* v. *Petrillo,* 332 U. S. 1, 9. See also, *e.g., Hamilton* v. *Kentucky Distilleries & W. Co.,* 251 U. S. 146, 161. Appellants' argument that regulation of the distilling industry alone cannot effectively conserve grain also overlooks the fact that Section 4(b) is but a single subsection of a statute which provides various methods for dealing with food and other shortages. See Sections 2, 3, 4(a), 6, 7 and 8. Although the statute primarily contemplates voluntary controls (Section 2), mandatory controls were authorized for the distilling industry only because voluntary controls had broken down. See 93 Cong. Rec. 11624 (unbound).

c. The constitutional attack upon Section 4(b) as an invalid delegation of legislative authority is also untenable. The specific definition of the commodity to be allocated, the limitation of the power to a single industry, and the short period of regulation (until January 31, 1948), would seem, in and of themselves, sufficiently to circumscribe the per-

missible area of administrative action to refute any charge of unconstitutional delegation. See *Yakus* v. *United States*, 321 U. S. 414, 424. Taken together with the statement of purposes contained in Section 1 of Public Law 395, the standards prescribed in Title III of the Second War Powers Act, 1942, and the legislative and administrative background of the enactment, the authority granted, narrowly restricted as it is in both time and scope, would seem unassailable as a valid delegation.

Title III of the Second War Powers Act, 1942 (50 U. S. C., App. Sec. 633), which has been "revived and reenacted" by Section 4(b) of Public Law 395 with respect to the exercise of powers relating to designated uses of grain, prescribes the occasion for and the standards to be employed in the exercise of the power.[1] Public Law 395, entitled a "Joint Resolution To aid in the stabilization of commodity prices, to aid in further stabilizing the economy of the United States, and for other purposes," contains the following statement of purposes in Section 1:

> The purposes of this joint resolution are to aid in stabilizing the economy of the United States, to aid in curbing inflationary tendencies, to promote the orderly and equitable distribution of goods and facilities, and to aid in preventing maldistribution of goods and facilities which basically affect the cost of living or industrial production.

It is submitted that the foregoing statutory provisions contain adequate standards of administrative action. The allocation of materials may be made only when "the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage" and only "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public

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[1] The pertinent section is set forth in the statement *supra*.

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interest and to promote the national defense." This administrative authority is further conditioned by the statement of purposes in Public Law 395. See *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 104.

The validity of the standards of Title III of the Second War Powers Act has been challenged in the Federal Courts on numerous occasions and has been uniformly sustained. *O'Neal* v. *United States*, 140 F. 2d 908 (C. C. A. 6), certiorari denied, 322 U. S. 729; *United States* v. *Randall*, 140 F. 2d 70 (C. C. A. 2); *Gallagher's Steak House* v. *Bowles*, 142 F. 2d 530 (C. C. A. 2), certiorari denied, 322 U. S. 764; *Country Garden Market, Inc.* v. *Bowles*, 141 F. 2d 540 (App. D. C.), certiorari denied, 322 U. S. 752; *Walter Brown & Sons* v. *Bowles*, 58 F. Supp. 323 (D. C. D. C.); *United States* v. *Tire Center, Inc.*, 50 F. Supp. 404 (D. Del.). The correctness of these decisions is established by the numerous decisions of this Court which have approved delegations no less general or indefinite. The standards upheld are discussed in *Yakus* v. *United States*, 321 U. S. 414, 426-427 and *American Power Co.* v. *S. E. C.*, 329 U. S. 90, 104-105. It is clear from this discussion that the standards imported into Section 4(b) by the limited reenactment of Title III of the Second War Powers Act, conditioned by the statement of purposes in Public Law 395, satisfy constitutional requirements.

3. This does not appear to be a case for review by direct appeal to this Court. Because of its holding that there was no substantial question of the constitutionality of Section 4(b), the only order entered by the three-judge court was one remitting the cause to a single district court judge for appropriate action. No order granting or denying an interlocutory or permanent injunction, the jurisdictional prerequisite to direct appeal (Act of August 24, 1937, c. 754, Sec. 3, 50 Stat. 751, 752, 28 U. S. C. § 380a), was entered.

The existence of a substantial constitutional question is a condition to the exercise of jurisdiction by a three-judge court and to the right of direct appeal to this Court. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Water Service Co.* v. *Redding*, 304 U. S. 252; *Ex parte Buder*, 271 U. S. 461; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 15.[2] The heavy burden which the assembly of three-judge courts and direct appeals impose on the federal courts has resulted in a strict interpretation of cases which require three judges (*Ex parte Collins*, 277 U. S. 565, 569; *Water Service Co.* v. *Redding, supra*, at 255; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 391; *Phillips* v. *United States*, 312 U. S. 246, 250-251; *Smith* v. *Wilson*, 273 U. S. 388; *Rorick* v. *Comm'rs*, 307 U. S. 208; *Gally* v. *Interstate Nat. Gas Co.*, 292 U. S. 16; *Ex parte Bransford*, 310 U. S. 354; *Ex parte Public Bank*, 278 U. S. 101) and a literal construction of decrees "granting or denying • • • an interlocutory or permanent injunction" from which appeals may be taken. *Pendergast* v. *United States*, 314 U. S. 574; *American Insurance Co.* v. *Lucas*, 314 U. S. 575. Cf. *Pub. Serv. Comm'n* v. *Brashear Lines*, 306 U. S. 204; *Commission* v. *Brashear Lines*, 312 U. S. 625. Upon deciding that no substantial constitutional question was presented, the three-judge court had no jurisdiction to pass upon the other issues in the case and properly remitted the cause for appropriate action to a single district judge. *Jameson & Co.* v. *Morgenthau, supra; Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 391-392. The order of a three-judge court declining jurisdiction is not one granting or denying an injunction and consequently is not directly reviewable by appeal. *Pub. Service Comm'n* v. *Brashear Lines, supra;* cf. *Pendergast* v. *United States,*

[2] The applicability of decisions relating to three-judge courts under § 266 of the Judicial Code (28 U.S.C. § 380) has been recognized. *Water Service Co.* v. *Redding, supra*, at 254. Decisions under § 266 will therefore be cited as authority without special comment.

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supra; American Insurance Co. v. *Lucas, supra.* The refusal of a single judge to convoke a three-judge court has consistently been held subject to review by mandamus. *Ex parte Williams,* 277 U. S. 267; *Ex parte Bransford,* 310 U. S. 354; *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10. Mandamus would also seem to be the proper remedy for a three-judge court's improper refusal to act. *Ex parte Public Bank,* 278 U. S. 101; *Osage Tribe of Indians* v. *Ickes,* 45 F. Supp. 179, 186-187 (D. C. D. C.). Mandamus will present only the question of jurisdiction and will not raise other questions presented by the appeal which the three-judge court did not consider.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed or, in the alternative, that the judgment below be affirmed pursuant to paragraph 3 of Rule 12 and paragraphs 3 and 4 of Rule 7 of this Court.

PHILIP B. PERLMAN,
Solicitor General.

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APRIL 26, 1948.

Per Curiam Decision.

No. 719. SCHENLEY DISTILLING CORP. ET AL. *v.* ANDERSON, SECRETARY OF AGRICULTURE. Appeal from the District Court of the United States for the District of Columbia. *Per Curiam:* The parties being in agreement that the cause is moot, the motion to dismiss is granted and the appeal is dismissed. *Robert S. Marx* and *Henry H. Fowler* for appellants. *Solicitor General Perlman* for appellee.